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The PLO Case: Terrorism, Statutory Interpretation, and Conflicting Obligations under Domestic and Public International Law

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I. INTRODUCTION

United States v. P.L.O.[1] [hereinafter PLO Mission Case] involved a

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1. United States v. P.L.O., 695 F. Supp. 1456 (S.D.N.Y. 1988).

conflict between United States law, international law, and an advisory opinion of the International Court of Justice (ICJ). The District Court was faced with the issue of whether the Attorney General could force the closure of the PLO Mission to the United Nations (UN) on the ground that the Palestine Liberation Organization (PLO) was a terrorist organization. Such a case raises serious issues of sovereignty, statutory interpretation, and the proper role of courts in resolving difficult disputes that threaten world peace.

The PLO Mission case might have resulted in catastrophe. Since the United States is the host country to the UN, it has a special relationship with that organization. If the PLO Mission had been closed, the United States could have become an international outlaw with its role as host country seriously impaired. Moreover, the PLO became the focal point of the controversy which culminated in the ICJ's advisory opinion and several cases in United States federal courts, making the matter that much more controversial. For this reason alone, it is essential to dispassionately examine not only the court decisions, but also the intricate circumstances preceding them. Otherwise, it is not possible to fully analyze the appropriateness of the ICJ's advisory opinion, its impact on the United States federal court's decision, and the correctness of that decision.

The need to reconcile United States Madisonian democratic processes[2] with the international order is highly significant to our legal system and public policy. A significant doctrine in interpreting the Supremacy Clause of the United States Constitution, the last in time doctrine, casts doubt on whether Congress is bound domestically to international agreements to which the United States is a party. Briefly, the "last in time" doctrine treats ratified treaties and congressional legislation on an equal footing. Therefore, a law enacted by Congress after a treaty goes into effect that contradicts that treaty, repeals that treaty as a matter of domestic law. As long as the doctrine is followed, the nature of the United States international treaty obligations remain obscure, binding on the international level but only conditionally operative on the domestic level.

A function of the separation of powers is to check decisions made in the passions of the moment which compel action not in the best interests of the republic. Perhaps it is appropriate that the final decision in this

2. The United States Madisonian democratic process is the constitutionally defined bicameral legislative methodology through which federal statutes become enacted as laws of the sovereign nation of the United States of America.

matter was made by the judiciary. Yet, the decision was not appealed and it remains only a district court opinion. Congress has chosen not to act further—but it might. Consequently, what is offered here cannot be a final conclusion, but only an analysis supplemented by one author's opinion in an area of increasing importance.

II. THE ANTI-TERRORISM ACT

Basically, the conflict in the PLO Mission Case revolved around two different interpretations of the Anti-Terrorism Act: that Congress intended to shut down all PLO office in the United States including the PLO Mission to the United Nations, or that Congress intended to shut down all PLO offices in the United States except the PLO Mission to the United Nations. A related question is whether this legislation intended to bar the PLO because it is a "terrorist organization" (something which is not defined) or because it is the PLO.

The Anti-Terrorism Act of 1987 (ATA), which came into force on March 21, 1988,[3] states in its "Determinitions" that the PLO is a "terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States."[4] Passed in the heat of passion, this legislation was not subject to congressional hearings nor to examination by any congressional committee.[5] Moreover, the purported concern with international law expressed in the legislation belied a disregard for it on its face. Section 5202, the operative provision of the statute, provides:

> It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after the effective date of this chapter —
> (1) to receive anything of value except informational material from the PLO or any of its constituent groups, any successor thereto, or any agents thereof;
> (2) to expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or
> (3) notwithstanding any provision of law to the contrary, to establish

3. *See* 22 U.S.C. §§ 5201-5203 (Supp. 1987).

4. *Id.* § 5201(b).

5. *See* 133 CONG. REC. S13,855 (daily ed. Oct. 8, 1987) (statement of Sen. Kassebaum) ("[W]e do have hearings scheduled in the Foreign Relations Committee . . . [and] it is important for us to have a hearing to explore the ramifications of the issues . . . ."). Senator Bingaman said: "We need to further explore the issues raised by this amendment. It is an amendment that has not had any hearings, has not been considered in committee, and one that raises very serious issues of constitutional rights . . . ." *Id.* at S13,852.

> or maintain an office, headquarters, premises or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.[6]

Perhaps the most significant aspect of this law (regarding motivation) is contained in Section 5201's findings of Congress:

> (1) Middle East terrorism accounted for 60 percent of total international terrorism in 1985;
> (2) the Palestine Liberation Organization . . . was directly responsible for the murder of an American citizen on the Achille Lauro cruise liner in 1985, and a member of the PLO's Executive Committee is under indictment in the United States for the murder of that American citizen;
> (3) the head of the PLO has been implicated in the murder of a United States Ambassador overseas;
> (4) the PLO and its constituent groups have taken credit for, and been implicated in, the murders of dozens of American citizens abroad;
> (5) the PLO covenant specifically states that "armed struggle is the only way to liberate Palestine, thus it is an over all strategy, not merely a tactical phase";
> (6) the PLO rededicated itself to the "continuing struggle in all its armed forms" at the Palestine National Council meeting in April 1987; and
> (7) the Attorney General has stated that "various elements of the Palestine Liberation Organization and its allies and affiliates are in the thick of international terror."[7]

The 1985 hijacking of the cruise ship *Achille Lauro* and the killing of passenger Leon Klinghoffer, an elderly and infirm American citizen, was the last straw for many members of Congress. Masterminded by Abul Abbas of the Palestine Liberation Front, a radical splinter group of the PLO,[8] this brutal act of terrorism produced an uproar in the United States and a demand for Congressional action. Senator Grassley of Iowa responded with the ATA (also known as the Grassley Amendment), which was added as an amendment to the Foreign Relations Authorization Act for Fiscal Years 1988-89. The Amendment was added on the floor of the Senate on October 8, 1987, despite the objections of several

6. 22 U.S.C. § 5202 (Supp. 1987).

7. *Id.* § 5201.

8. N.Y. Times, Jan. 22, 1989, § 4 (Week in Review), at 5. Abul Abbas was retained as a member of the PLO Executive Committee. *Id.*

senators.[9] This spending bill provided funding for the operation of the State Department, including the operation of the United States Mission to the UN, and for maintenance and operation of the UN.[10] No provision equivalent to the ATA was contained in the House version of the spending bill, and the ATA was only cursorily discussed during a joint conference that covered the entire spending bill. After the House conferees rejected, by a vote of eight to eleven, an exemption for the PLO Mission to the United Nations, they agreed to the Senate's version.[11]

The result was a Congressional compromise that enabled the elected representatives to satisfy their constituents' growing hostility toward the UN and the mounting sentiment against the PLO.[12] Without a trial, Congress convicted an entire political movement of being a "terrorist organization." But punishment was not automatic. In typical fashion, Congress gave that responsibility to the executive branch. Section 5203, the enforcement provision, gave the Attorney General the power to "take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of this chapter."[13] Moreover, under this provision, any United States district court has the power to grant injunctive or other equitable relief.[14] However, these provisions would cease to be effective if the President certified that the PLO and its agents "no longer practice or support terrorist actions anywhere in the world."[15]

Describing the reaction of the Executive Branch, which is generally regarded as being charged with the conduct of foreign affairs,[16] the New

9. *See* 133 CONG. REC., *supra* note 5, at S13, 855.

10. Foreign Relations Authorization Act, Pub. L. No. 101-204, §§ 101, 102(a)(1). 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1331, 1335, 1336.

11. 133 CONG. REC. S18,193 (daily ed. Dec. 16, 1987); *see id.* at S18,186, S18,189 (statements of Sen. Helms).

12. N.Y. Times, May 16, 1989, at A10, col. 1. Congressional critics of the U.N. continue to seek to reduce funds for the organization "on the grounds that it opposes American interests." *Id.* This hostility is to a great extent engendered by a continually diminished level of support in the General Assembly for U.S. positions. *Id.* Resentment in the U.S. towards the PLO reached its peak when Yasir Arafat, Chairman of the PLO, was denied a visa to enter the United States to make a speech at the UN because, in a statement issued by the Reagan administration, he "knows of, condones and lends support to" acts of terrorism. N.Y. Times, Nov. 27, 1988, at A1, col. 6.

13. 22 U.S.C. § 5203(a) (Supp. 1987).

14. *Id.* § 5203(b).

15. *Id.* § 5201(b).

16. *See* United States v. Curtis-Wright Export Corp., 299 U.S. 304, 319-20 (1936); United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937). The Court in *Curtis-Wright* recognized "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *Curtis-Wright*, 299 U.S. at 320. Suggesting that this was an area not to be invaded by Congress, the Court also noted: "In this vast external realm, with its important, complicated,

York Times reported Secretary of State George P. Schultz' reaction to the prohibition on PLO offices in the United States as "one of the dumber things that the Congress has done lately."[17]

III. THE HEADQUARTERS AGREEMENT

The role of the United States as the host country to the UN was central to the controversy because of the issues of international law raised by the special relationship between the United States and the UN.

The significance of the selection of New York City as the principal home of the UN is not to be minimized. The United States gained considerable prestige, given the jockeying for power after the Second World War. The practical effect was to establish New York as the capital of the world, like Geneva during the days of the League of Nations. In 1945, an invitation was extended to the UN by the United States, "one of its principal founders, to establish its seat within the United States."[18] Following this invitation, the UN Headquarters in New York was established as an "international enclave"[19] by the agreement between the United States and the United Nations [hereinafter Headquarters Agreement].[20] The Headquarters Agreement was an executive agreement and not submitted to the Senate for its "advice and consent" pursuant to Article II, Section 2, (2) of the Constitution.[21] However, the President was authorized to bring it into force by a Joint Resolution of the Congress,

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delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' " *Id.* at 319. *See also* Haig v. Agee, 453 U.S. 280, 290 n.17 (1981); Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 109-110 (1948); Goldwater v. Carter, 617 F.2d. 697, 705, 707, 735 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979) ("The President is the constitutional representative of the United States with respect to external affairs."); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 178 (1972) ("The whole conduct of our foreign relations is exclusively the President's."). This point was noted by The Association of the Bar of the City of New York in its Memorandum in Support of Motion for Leave to File Brief Amicus Curiae at 5, United States v. PLO, 695 F. Supp. 1456 (S.D.N.Y. 1988) (No. 88 Civ. 1962).

17. N.Y. Times, March 12, 1988, at 4, col. 5.

18. *PLO*, 695 F. Supp. at 1458 (citing H.R. Con. Res. 75, 79th Cong., 1st Sess., 59 Stat. 848 (1945)).

19. *PLO*, 695 F. Supp. at 1458.

20. G.A. Res. 169, U.N. Doc. A/519, at 91 (1947) [hereinafter Headquarters Agreement]; *see also* 1 FOREIGN RELATIONS OF THE UNITED STATES 1947, at 42-46 (1973).

21. This process, requiring that treaties made by the President be approved by "two-thirds of the Senators present concurring," is referred to as "ratification," but is not the same thing as ratification of treaties following signature under international law.

reciting the entire text of the Headquarters Agreement in full.[22] This had the effect of adopting the Agreement as domestic law.[23]

Section 11 of the Agreement (the Access Clause) states:

> The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of (1) Representatives of Members . . . or . . . (5) Other persons invited to the headquarters district by the United Nations . . . on official business.[24]

Section 12 provides that Section 11 shall be applicable regardless of the "relations existing between the Governments of the persons referred to in that section and the Government of the United States."[25] Section 13(a) states that United States laws and regulations regarding the entry of aliens shall not be applied to interfere with the privileges granted by Section 11. If visas are required, they should be "granted without charge

22. S.J. Res. 144, 61 Stat. 756, 757-58 (1947).

23. 22 U.S.C. § 287 historical note (1982).

24. Headquarters Agreement, *supra* note 20, at 96. The other categories of persons invited to the Headquarters district are: (2) experts working for the UN or its agencies, (3) accredited press representatives, and (4) recognized nongovernmental organizations. *Id.* The Joint Resolution section 6, which authorizes the President to bring the Headquarters Agreement into effect on the part of the U.S., provides that "[n]othing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the headquarters district and its immediate vicinity, . . . and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries." S.J. Res. 144, 61 Stat. 767, *reprinted in* 22 U.S.C. § 287 historical note (1982). This would appear to be compatible with 13(d) of the Headquarters Agreement, which specifies that *except* as provided above, "the United States retains full control and authority over the entry of persons or property into the territory of the United States."

> The Secretary-General of the United Nations was authorized to bring the Headquarters Agreement into force by the General Assembly, which approved the text of the Agreement in its resolution 169 (II). But in the event that the provision in section 6 of the Joint Resolution had been intended by the United States to constitute a reservation, it was never made known to the General Assembly as such, and it was never considered by the General Assembly nor accepted by it.
>
> . . . .
>
> Finally, even if the United States had intended to formulate a reservation, it would not appear from a reading of section 6 of the Joint Resolution that it could have application to the present case. It refers to control by the United States of the entrance of aliens to any territory other than the Headquarters District, its immediate vicinity, and the necessary area of transit. It appears from the foregoing that persons falling within the classes referred to in section 11 of the Headquarters Agreement are entitled to transit to and from the Headquarters District, and that this right of transit has not been made the subject of any reservation.

Memorandum by the Legal Department, 15 U.N. ESCOR Annexes (Agenda Item 34) at 2, 3, U.N. Doc. E/2397 (1953), *reprinted in* L. HENKIN, R. PUGH, O. SCHECTER, & H. SMIT, INTERNATIONAL LAW 976 (West 2d ed. 1987) [hereinafter L. HENKIN].

25. Headquarters Agreement, *supra* note 20, at 96.

and as promptly as possible."[26] Section 21(a) of the Agreement (the Arbitration Clause) provides for the arbitration of "[a]ny dispute between the United Nations and the United States concerning the interpretation or application of this agreement or any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement . . . ."[27] The Secretary-General of the UN and the United States Secretary of State each name one arbitrator to a panel of three. Together, they shall chose the third arbitrator. If they cannot agree upon a third arbitrator, then the President of the ICJ shall choose the third arbitrator.[28]

The UN was formed as a meeting place and forum for all nations, and according to its Charter, formed to:

> maintain international peace and security . . . ; develop friendly relations among nations, based on the principle of equal rights and self-determination of peoples . . . ; achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character . . . ; and . . . be a center for harmonizing the actions of nations in the attainment of these common ends.[29]

In 1945, the entire world converged on New York, with 159 of the UN's members maintaining missions to the UN.[30] Further, "the United Nations has, from its inception, welcomed various non-member observers to participate in its proceedings."[31] As a result, several non-member countries,[32] various intergovernmental organizations,[33] and other organi-

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26. *Id.* Section 27 of the Headquarters Agreement states that the agreement "shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently, to discharge its responsibilities and fulfill [sic] its purposes." *Id.* at 101. The Secretariat, in a note to the Under-Secretary for Economic and Social Affairs, Nov. 26, 1963, argued that "the essential element in the right of access [to meetings of the U.N.] is that representatives of governments, officials of the Organization and other persons invited on official business shall not be impeded . . . in connexion [sic] with meetings or other activities in which they are entitled to participate." 1963 U.N. JURID. Y.B. 167-68, U.N. Doc. ST/LEG/SER.C/1.

27. Headquarters Agreement, *supra* note 20, at 99-100.

28. *Id.* at 100.

29. U.N. CHARTER art. 1.

30. United States v. PLO, 695 F.Supp. 1456, 1458 (S.D.N.Y. 1988) (citing U.N. Protocol & Liaison Serv., *Permanent Missions to the United Nations No. 262*, at 3-4 (1988)).

31. *Id.* (citing *Permanent Missions to the U.N.: Report of the Secretary-General*, 4 U.N. GAOR C.6. Annex (Agenda Item 50) at 16, 17, para. 14, U.N. Doc. A/939/Rev. 1 (1949)).

32. Specifically, these are the Democratic People's Republic of Korea, the Holy See, Monaco, the Republic of Korea, San Marino and Switzerland. *Id.* at 1459 n.4 (citing U.N. Protocol & Liason Serv., *supra* note 30, at 270-77).

33. Specifically, these are the Asian-African Legal Consultative Committee, the Council for Mutual Assistance, the European Economic Community, the League of Arab States, the Organization of African Unity and the Islamic Conference. *Id.* (citing U.N. Protocol & Liason Serv., *supra* note 30, at 278-84).

zations[34] maintain "Permanent Observer Missions" in New York.

In 1974, the UN invited the PLO to become an "observer" at the UN,[35] to "participate in the sessions and the work . . . of the General Assembly in the capacity of observer."[36] "For nearly forty years, the United States ha[d] acquiesced in the presence of such observer missions and has refrained from impeding their function."[37] "The Department of State ha[d] never disputed that this right of access includes maintenance of an office in which to organize and carry out official United Nations business."[38] However, a nongovernmental group immediately, but unsuccessfully, challenged the right of the PLO's representatives to enter the United States and to gain access to the UN.[39]

As a result of the Headquarters Agreement, the PLO has, since 1974, continued to function "without interruption as a permanent observer and has maintained its Mission to the United Nations without trammel."[40]

IV. THE DEVELOPMENT OF THE CONTROVERSY

The United States Executive Branch's position was that the ATA required the closing of the PLO Mission to the UN and that this conflicted with the United States obligations under the Headquarters Agreement.[41] Hence, it conflicted with the United States obligations under

34. Specifically, these are the PLO and the South West African Peoples' Organization (SWAPO). *Id.* at 1456 n.6 (citing U.N. Protocol & Liason Serv., *supra* note 30, at 285-86).

35. G.A. Res. 3237, 29 U.N. GAOR Supp. (No. 31) at 4, U.N. Doc A/9631 (1974).

36. *Id.*; *see also* G.A. Res. 3210, 29 U.N. GAOR Supp. (No. 31) at 3, U.N. Doc. A/9631 (1974); G.A. Res. 3236, 29 U.N. GAOR Supp. (No. 31) at 4, U.N. Doc. A/9631 (1974).

37. Koenig, *Palestine Liberation Organization No. 88 Civ. 1962 (ELP)*, 82 AM. J. INT'L L. 833, 834 (1988).

38. *Id.* at 834-35.

39. United States v. PLO, 695 F. Supp. 1456, 1459 (S.D.N.Y. 1988) (citing Anti-Defamation League of B'nai B'rith v. Kissinger, Civ. No. 74 C 1545 (E.D.N.Y. Nov. 1, 1974)).

The Eastern District Court of New York rejected this challenge, and upheld the presence of a PLO representative in New York with access to the UN. The visas were limited to a radius of twenty-five miles from Columbus Circle in Manhattan. Judge Costantino stated:

> This problem must be viewed in the context of the special responsibility which the United States has to provide access to the UN under the Headquarters Agreement. It is important to note for the purposes of this case that a primary goal of the UN is to provide a forum where peaceful discussion may displace violence as a means of resolving disputed issues. At times our responsibility to the UN may require us to issue visas to persons who are objectionable to certain segments of our society.

Id. (citing Anti-Defamation League of B'nai B'rith, Civ. No. 74 C 1545, at 37). On the legal access issues as they stood at that time, see TOBIASSEN, RELUCTANT DOOR — THE RIGHT TO ACCESS TO THE UNITED NATIONS (1969).

40. *PLO*, 695 F. Supp. at 1459.

41. *See* Comm. on Relations with the Host Country: Report of the Secretary-General, 42

international law; although, the Executive Branch seemed to strain to find some way to interpret the law to reach a different conclusion. To the State Department the fundamental question was whether any criticism of the legislation was premature, first, because the legislation had not yet been enacted[42] and second, because it had not yet been implemented.[43] The sequence of events was as follows:[44] When the Secretary General of the UN learned of the impending passage of the ATA in Congress, he expressed his initial concern in a letter dated October 13, 1987, to the Permanent Representative of the United States.[45] In discussions in the UN General Assembly Committee on Relations with the Host Country, the United States representative acknowledged that closing of the PLO Mission would be inconsistent with the host country's obligations under the Headquarters Agreement.[46] He stressed, however, that it was "premature" to speculate on the "outcome of the legislative process."[47] This was reported by the Host Country Committee to the Sixth (Legal) Committee of the General Assembly,[48] and then to the plenary by the Sixth (Legal) Committee.[49]

A. UN Resolution 42/210B

On December 17, 1987, the General Assembly adopted Resolution 42/210B[50] by a vote of 145 to 1 with no abstentions. (Israel cast the negative vote and the United States did not participate).[51] The resolution requested "the host country to abide by its treaty obligations under the

U.N. GAOR (Agenda Item 136) at 2, U.N. Doc. A/42/915 (1988) [hereinafter Host Country Report]. Ambassador Herbert Okun suggested in a letter to the UN Secretary General that the provisions concerning the PLO Observer Mission "may infringe on the President's constitutional authority." *Id.* Since it is not to be presumed that Congress intends to pass unconstitutional legislation, it would follow that the executive branch could interpret the ATA as not requiring the shutting down of the PLO Mission to the UN. Further, "[t]he Executive Branch was still examining the possibility of interpreting the law in conformity with the United States obligations under the Headquarters Agreement regarding the PLO Observer Mission." *Id.*

42. Szasz, *Introductory Note* to *Documents Concerning the Controversy Surrounding the Closing of the Palestine Liberation Organization Observer Mission to the United Nations*, 27 I.L.M. 712, 712 (1988).

43. Host Country Report, *supra* note 41, at 1.

44. Szasz, *supra* note 42, at 712 (based on the reports of the Committee on Relations with the Host Country).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. G.A. Res. 42/210B, 42 U.N. GAOR Supp. (No. 49) at 301, U.N. Doc. A/42/49 (1987).

51. Szasz, *supra* note 42, at 712-13.

Headquarters Agreement and . . . to refrain from taking any action that would prevent the discharge of the official functions of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations" and that "the Secretary-General . . . take effective measures to ensure full respect for the Headquarters Agreement and to report, without delay, to the General Assembly on any further development in this matter."[52] Lastly, the General Assembly decided to "keep this matter under active review."[53] The General Assembly also noted the Secretary-General's position on the PLO Mission. His position was described in the statement of October 22, 1987:

> The members of the Palestine Liberation Organization Observer Mission are, by virtue of resolution 3237 (XXIX), invitees to the United Nations. As such, they are covered by sections 11, 12 and 13 of the Headquarters Agreement of 26 June 1947. There is therefore a treaty obligation on the host country to permit Palestine Liberation Organization Observer Mission personnel to enter and remain in the United States to carry out their official functions at the United Nations Headquarters.[54]

Anticipating the adoption of the ATA by the Congress, the Secretary-General wrote two additional letters to Ambassador Walters, the Permanent Representative of the United States. In the first letter, dated December 7, 1987, the Secretary-General expressed:

> [T]he hope that it would be possible for the United States Administration, in line with its own legal position, to act to prevent the adoption of the legislation; the United States Department of State had repeatedly taken the position that the United States is 'under an obligation to permit PLO Observer Mission personnel to enter and remain in the U.S. to carry out their official functions.' In the event that the proposed legislation became law, however, the Secretary-General sought assurances that the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected.[55]

In the second letter, dated December 21, 1987, the Secretary-General informed the Permanent Representative of the adoption of resolution 42/210B by the General Assembly. He also asked to be informed of any further developments regarding the pending legislation.[56]

On January 5, 1988, Acting Permanent Representative of the

52. G.A. Res. 42/210B, *supra* note 50, at 302.
53. *Id.*
54. *Id.*
55. Host Country Report, *supra* note 41, at 2.
56. *Id.*

United States to the United Nations, Ambassador Herbert Okun, informed the Secretary-General that the Act had been signed by President Reagan on December 22, 1987 and that the section relating to the PLO would take effect ninety days after that date. "Because the provisions concerning the PLO Observer Mission may infringe on the President's constitutional authority and, if implemented, would be contrary to our international legal obligations under the United Nations Headquarters Agreement," Okun asserted, "the Administration intends, during the ninety-day period before this provision is to take effect, to engage in consultations with the Congress in an effort to resolve this matter."[57]

The Secretary-General wrote again to Ambassador Walters on January 14, 1988, "welcoming the intention expressed in Ambassador Okun's letter to use the ninety-day period to engage in consultations with the Congress."[58] Nevertheless, the Secretary-General was obliged to point out that the "assurance[s] sought in his letter of 7 December 1987 had not been forthcoming and that under these circumstances it had to be concluded that a dispute existed between the United Nations and the United States concerning the interpretation and application of the Headquarters Agreement."[59] "Accordingly, the Secretary-General invoked the dispute settlement procedure set out in section 21 of the Agreement and proposed that the negotiations phase of the procedure commence on January 20, 1988."[60]

A series of meetings occurred involving the Legal Counsel to the UN, the Legal Adviser of the State Department, Judge Abraham D. Sofaer, and the Legal Adviser of the United States Mission. The Legal Counsel was informed in these meetings that the United States was not ready to enter formally into the dispute settlement procedure since the United States was still evaluating the situation and had not yet concluded that a dispute existed because the legislation had not yet been implemented.[61] The United States also stressed that "the Executive Branch was still examining the possibility of interpreting the law in conformity with the United States obligations under the Headquarters Agreement regarding the PLO Observer Mission . . . or alternatively of providing assurances that would set aside the ninety-day period for the coming into

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* "The Secretary General named Mr. Carl-August Fleischauer, the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, his representative in these negotiations." *Id.*

61. *Id.*

force of the legislation."[62]

This meant that the Executive Branch was not absolutely locked into an interpretation of the ATA that required the closing of the Mission. More significantly, this position indicated that the Executive Branch could indefinitely postpone the entire matter by avoiding the ninety-day period mandated by Congress. If this could be accomplished, and the Secretary of State could persuade the PLO to renounce terrorism, the legislation would become moot and the matter disposed of without dealing with the sticky issue of whether a dispute existed between the United States and the United Nations under the Headquarters Agreement. The ATA could still serve as leverage with the PLO to alter their position on terrorism by threatening to close the Observer Mission in the future. In short, everyone would be off the hook.

But this was not to be the case. The Legal Counsel of the UN rejected this position, stating that the question was "one of compliance with international law."[63] Quite simply, this meant that the Headquarters Agreement was a binding international instrument and the ATA violated it. Stated bluntly, "Section 21 of the Agreement set out the procedure to be followed in the event of a dispute as to its interpretation or application, and the United Nations had every intention of defending its rights under that Agreement."[64] The Legal Counsel insisted that if the PLO Observer Mission was not to be exempted from the application of the law, then "the procedure provided for in section 21 be implemented and also that technical discussions regarding the establishment of an arbitral tribunal take place immediately."[65] The United States agreed to such discussions but only on an informal basis.[66] When the technical discussions started on January 28, 1988, the costs of the arbitration, its location, its secretariat, languages, rules of procedure, and the form of the compromise between the two sides were considered.[67]

If arbitration actually began under section 21, it would be tantamount to an acceptance by the United States that an international tribunal had the authority to pass judgment on an act of Congress which had not been declared to be unconstitutional by any court in the United

62. *Id.*

63. *Id.*

64. *Id.* at 3.

65. *Id.*

66. *Id.* at 2. "[T]he United States was not in a position and not willing to enter *formally* into the dispute settlement procedure under section 21 of the Headquarters Agreement." *Id.* (emphasis added).

67. *Id.* at 3.

States. This was clearly not acceptable either legally or politically for the Administration. Its only tactic was to stall.

The lack of progress compelled the Secretary-General to write yet another letter to Ambassador Walters on February 2, 1988. Noting the lack of any assurances by the United States about the implementation of the arbitration procedures, he stated:

> The section 21 procedure is the only legal remedy available to the United Nations in this matter and since the United States so far has not been in a position to give appropriate assurances regarding the deferral of the application of the law to the PLO Observer Mission, the time is rapidly approaching when I will have no alternative but to proceed either together with the United States within the framework of section 21 of the Headquarters Agreement or by informing the General Assembly of the impasse that this been reached.[68]

Following a meeting between the Secretary-General and Ambassador Walters on February 4, 1988, the UN was informed that a decision would be communicated to the Secretary-General no later than February 10, 1988. On February 10, the Secretary-General learned that the United States administration had not made a decision about the PLO Mission and would not make one until the following week. The Secretary-General announced his intention of making every effort to settle the dispute within the framework of section 21, and because the effective date of the ATA was approaching, he notified the General Assembly of the "impasse."[69] On February 18, the State Department Legal Adviser told the Legal Counsel that the United States had still not made a decision concerning the PLO Mission.[70] Further inquiries established that no date for a decision had been set, and there were no further communications between the UN and the United States with regard to such a date. On February 11, the Legal Counsel of the UN informed the Legal Adviser of the State Department that the United Nations had chosen Mr. Eduardo Jimenez de Arechaga, former President and Judge of the ICJ, as arbitrator in "the event of arbitration" under Section 21. In so doing, he referred to the letter of January 14 to Ambassador Walters, formally invoking the dispute settlement procedures of section 21 of the Headquarters Agreement. Although the Legal Adviser of the State Department was urged, by virtue of the "constraints under which both parties

68. *Id.*

69. *Id.* at 3-4.

70. 42 U.N. GAOR (Agenda Item 136, addendum part 1) at 1, U.N. Doc. A/42/915/Add.1 (1988).

find themselves,"[71] to notify the UN as soon as possible of the choice made by the United States, no communication was received from the United States.[72]

On February 18, 1988, the Permanent Representative of Bahrain, acting in his capacity as Chairman of the Arab Group, sent a letter requesting that the forty-second session of the General Assembly reconvene.[73] This was followed on February 22 by similar requests from the Permanent Representative of Zimbabwe on behalf of the Coordinating Bureau of the Movement of Non-aligned Countries,[74] by the Permanent Representative of Kuwait on behalf of the members of the Organization of the Islamic Conference in New York,[75] and by the Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People on behalf of the Committee.[76] Following consultations with the Regional Groups, the President of the General Assembly reconvened the forty-second session on February 29, 1988.[77]

B. UN Resolutions 42/229A and 42/229B

The General Assembly adopted Resolution 42/229A on March 2, 1988,[78] noting that the ATA was to take effect on March 21 and concluded:

> [T]he United States of America, the host country, is under a legal obligation to enable the Permanent Observer Mission of the Palestine Liberation Organization to establish and maintain premises and adequate functional facilities and to enable the personnel of the Mission to enter and remain in the United States to carry out their official functions.[79]

Resolution 42/229B, also adopted by the General Assembly on March 2 requested an advisory opinion from the ICJ on the following question:

> In the light of facts reflected in the reports of the Secretary-General, is the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Head-

71. *Id.*
72. *Id.*
73. *Id.* at 2.
74. *Id.*
75. *Id.*
76. *Id.*
77. Szasz, *supra* note 42, at 713.
78. G.A. Res. 42/229A, 42 U.N. GAOR Supp. (No. 49A) at 1, U.N. Doc. A/42/229A. The vote was 143 to one, no abstentions, with only Israel in the negative, the U.S. not participating. Szasz, *supra* note 42, at 713.
79. G.A. Res. 42/229A, *supra* note 78, at 1.

quarters of the United Nations, under an obligation to enter into arbitration in accordance with section 21 of the Agreement?[80]

Paragraph 3 of Resolution 42/229A was seemingly inconsistent with 42/229B. The premise of Resolution 42/229B was that the relevant provisions of the ATA were inconsistent with the legal obligations of the host country under the Headquarters Agreement. However, paragraph 3 of Resolution 42/229A simply postulated that the "application" of the ATA "in a manner inconsistent with paragraph 2 above would be contrary to the international legal obligations of the host country under the Headquarters Agreement."[81] The Resolution did not define the meaning of "application." If it meant application by the Attorney General, then an advisory from the ICJ opinion would have been appropriate. But if it meant application by the courts in the United States, then an advisory opinion by the ICJ would have been premature until the statute was so construed and applied. As the ICJ noted in the *Interhandel Case*: "[T]he State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[82] Following the second interpretation and the *Interhandel Case*, the preoccupation with the ATA's effective date of March 21 and the reports on the failure of the United States to conform to section 21 or to respond to communications were unjustified. This position was based on the understanding that the ATA is not self-enforcing. The Attorney General must act, and even if he did, the President could still certify that the PLO was not a terrorist organization. There was no indication how such a decision would be reviewed, and whether or not the legislature would reject such a certification. Further, the analysis in the *Interhandel Case* suggests that before the ICJ could hold that the ATA violated the Headquarters Agreement, the PLO would first have to be ordered to shut down its Observer Mission and then exhaust its remedies in the United States courts. This is because the interpretation of the term "in a manner inconsistent" in paragraph 3 of Resolution 42/229A[83] cannot be understood until the highest court in the United States with jurisdiction so applied the statute and forced the closure of the Observer Mission. Only then would it be legally argued that the United States has violated its international obligations under the Headquarters Agreement. With this

80. G.A. Res. 42/229B, 42 U.N. GAOR Supp. (No. 49) at 2, U.N. Doc. A/42/229B. The vote was 143 to zero with no abstentions; the U.S. did not participate. Szasz, *supra* note 42, at 712-13.

81. G.A. Res. 42/229A, *supra* note 78, at 2.

82. Interhandel Case (Switz. v. U.S.), 1959 I.C.J 6, 27 (Mar. 21).

83. G.A. Res. 42/229A, *supra* note 78, at 1.

interpretation, the Attorney General could also refuse to apply the ATA on the grounds that he had no authority to violate the nation's international obligations.

On the other hand, an advisory opinion is just that, advisory, and as such, the opinion only clarifies an issue and serves as a reference point for the American executive and judicial decision makers. If perceived this way, the effect of an ICJ advisory opinion is different from the effect of a decision in a contentious case. The Court in *Western Sahara* observed: "The Court's reply is only of an advisory character: as such, it has no binding force."[84] Consequently, it could be argued that an advisory opinion cannot be premature if it states that the application of the ATA to the PLO Observer Mission might violate the United States international obligations under the Headquarters Agreement. There would be no obligation for the PLO to exhaust its remedies in United States courts before the General Assembly could request an advisory opinion and before the ICJ could render an opinion.

The PLO does not, itself, have standing before the ICJ and thus it cannot be a party to the kind of contentious dispute that the Court can decide.[85] Also, the General Assembly was not technically seeking to redress the grievances of the PLO, but enforcing its own rights under the Headquarters Agreement to have a dispute with the Host Country settled pursuant to section 21. Therefore, there was no reason to force the PLO to exhaust its remedies under United States law before the UN could take up its claim. However, this argument was unsound, since the groups pressuring for the reconvening of the General Assembly were less concerned about access and the Headquarters agreement than they were about the rights of the Palestinians to self-determination.[86] Notwithstanding this, 229B was adopted, at least theoretically, to obtain just an advisory opinion on behalf of the General Assembly.

84. Western Sahara, 1975 I.C.J. 12, 24 (Advisory Opinion Oct. 16) (quoting Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, 1950 I.C.J. 65, 71 (Advisory Opinion Mar. 30)). *But cf.* Eastern Carelia, 1923 P.C.I.J. (ser. B) No. 5, at 29. *See* Janis, *The International Court of Justice: Advisory Opinion on the Western Sahara*, 17 HARV. INT'L L.J. 609 (1976); *cf.* Herman, *An Analysis of the World Court Judgement on the Western Sahara Case*, 41 SASK. L. REV. 133 (1976). On ICJ advisory opinions generally, Szasz, *Enhancing the Advisory Competence of the World Court* in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 499 (L. Gross ed. 1976).

85. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 34, 59 Stat. 1055, 1059, U.S.T.S. No. 993. "Only states may be parties in cases before the Court." *Id.* The PLO is not a state. *See* United States v. PLO, 695 F. Supp. 1456, 1459 (S.D.N.Y. 1988).

86. Those groups were: the Arab Group, the Coordinating Bureau of the Movement of Non-aligned Countries, and the Committee on the Exercise of the Inalienable Rights of the Palestinian People. 42 U.N. GAOR (Agenda Item 136, addendum part 1), *supra* note 70, at 2.

This latter approach would justify the authority of the ICJ to give an advisory opinion, but the ultimate question is whether the court should have done so as a matter of its discretion. Because the United States is a member of the UN and the Host Country under the Headquarters Agreement, it should not be presumed to be in violation of its international obligations.[87] At the very least, it should be permitted to demonstrate that, under its own procedures and at the appropriate level, it can find a way to avoid such a violation before it becomes necessary to condemn it at the international level. As a matter of discretion, the ICJ could appropriately grant an advisory opinion on whether the ATA put the United States in default under section 21 of the Headquarters Agreement for failure to arbitrate a dispute with the UN after the highest courts in the United States determine that this statute must be applied to shut down the PLO Observer Mission. The ICJ was premature in its willingness to assist the American courts by informing them of the international obligations of the United States before they had, in fact, been violated and before an American judge had the opportunity to consider those international obligations in light of domestic legislation.

The United States Representative to the UN was informed by the Secretary General on March 4 of the adoption of Resolution 42/229A. The Secretary-General expressed the hope the United States would still be able to reconcile its domestic legislation with its international obligations. However, if this were not possible, he "trusted that the United States would recognize the existence of the dispute and agree to the utilization of the dispute settlement procedure provided for in section 21 of the Headquarters Agreement and that in the interim period the status quo would be maintained."[88] The Secretary-General also informed the International Court of Justice of Resolution 42/229B.[89]

The possibility that the Executive Branch could make such a reconciliation ended with the letter submitted to the Secretary-General, Javier

87. The United States contention, submitted to the ICJ, was: "[T]he United States will take no action to close the Mission pending decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely." Applicability of the Obligation to Arbitrate Under Section 21 of the Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, 29 (Advisory Opinion Apr. 26) [hereinafter Headquarters Agreement Advisory Opinion]. The Court rejected this contention, in effect presuming that the ATA was a violation of the Headquarters Agreement. *See generally* Reisman, *Respecting One's Own Jurisprudence: A Plea to the International Court of Justice*, 83 AM. J. INT'L L. 312, 312-16 (1989).

88. 42 U.N. GAOR (Agenda Item 136, addendum part 2) at 2, U.N. Doc. A/42/915/Add.2 (1988).

89. Szasz, *supra* note 42, at 713.

Perez De Cuellar, on March 11, 1988, by Ambassador Okun. Acknowledging the adoption of Resolutions 42/229A and 42/229B, Okun wrote:

> I wish to inform you that the Attorney General of the United States has determined that he is required by the Anti-Terrorism Act of 1987 to close the office of the Palestine Liberation Organization Observer Mission to the United Nations in New York, irrespective of any obligations the United States may have under the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations. If the PLO does not comply with the Act, the Attorney General will initiate legal action to close the PLO Observer Mission on or about March 21, 1988, the effective date of the Act. . . . The United States will not take other actions to close the Observer Mission pending a decision in such litigation. Under the circumstances, the United States believes submission of this matter to arbitration would not serve a useful purpose.[90]

It was clear that the Executive Branch had concluded that the ATA superseded any international obligations under the Headquarters Agreement and consequently that it had a responsibility to act pursuant to the ATA. The Executive Branch could have refused and interpreted the ATA not to apply to the Observer Mission and thus avoided the issue. Although it did not do this, the Executive Branch managed to leave the door open for such a result. The key operative words of Okun's letter were: "The United States will not take other actions to close the Observer Mission pending a decision in such litigation." The intention of the Executive Branch was clear: to defer any final determination that the United States was in a dispute pursuant to section 21 until the PLO contested the action of the Attorney General in the United States courts.

The interesting possibility that might have been presented was a victory for the United States against the PLO in the American courts followed by a demand for arbitration by the UN. In this case, the Executive Branch would have been obliged to decide whether its international obligations could, in fact, be superseded by an act of Congress subject to review by the United States courts. If arbitration under section 21 resulted in a ruling against the United States, then by which decision would the Executive Branch have considered itself bound? Article 27 of the Vienna Convention on the Law of Treaties provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[91] Thus, on the international level, the Executive

90. 42 U.N. GAOR Annex 1 (Agenda Item 136, addendum part 2), *supra* note 88, at 4.

91. UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES art. 27, at 293, U.N. Doc. A/CONF.39/11/Add.2, U.N. Sales No. E.70.V.5 (1971). Although the United States

Branch would be obligated to accept the decision of the arbitrators even though the United States courts had followed the last in time doctrine under the Supremacy Clause.[92]

If, on the other hand, the Executive Branch considered itself bound by a United States court's interpretation that an act of Congress superseded a treaty, and refused either to arbitrate or to accept the award, the UN would be injured by this breach of the obligation under the Headquarters Agreement by the United States, for which the United States would be responsible.[93] The prospect of making such a decision is not a comfortable one because this conflict between constitutional and international obligations could produce a major political and legal crisis. Okun's letter reflected this understanding and contained a not too subtly veiled plea to let the courts in the United States try to get the Executive Branch out of its dilemma.

The UN was pressed further by the Secretary-General's receipt of a letter from the Permanent Observer of the Palestine Liberation Organization, Zuhdi Labib Terzi, which referred to a letter dated March 11, 1988, from Edwin Meese III, Attorney General of the United States.[94] The Meese letter stated:

> I am writing to notify you that on March 21, 1988, the provisions of the 'Anti-Terrorism Act of 1987' . . . (the "ACT") will become effective. The Act prohibits, among other things, the Palestine Liberation Organization ("PLO") from establishing or maintaining an office within the jurisdiction of the United States. Accordingly, as of March 21, 1988, maintaining the PLO Observer Mission to the United Nations in the United States will be unlawful.

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has not ratified the Convention, the State Department has expressed its opinion that it codifies the existing customary law of treaties. OFFICE OF LEGAL ADVISOR, DEP'T OF STATE, 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 692-93, 703-05 (1983) (authored by M. Nash); *see* Weinberger v. Rossi, 456 U.S. 25, 29 n.5 (1982). The State Department has also taken the view that it applies to agreements not entered into pursuant to Article II of the Constitution. President's Message Transmitting the Vienna Convention on the Law of Treaties, S. Exec. Doc. L., 92d Cong., 1st Sess. 2 (1971); *see* 2 RESTATEMENT FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) III-1, 4 n.5 (Tent. Draft No. 6 1985) [hereinafter RESTATEMENT].

92. *See* 1 RESTATEMENT, *supra* note 91, § 135(b). "That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation." *Id.*

93. *See* Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 187-88 (Advisory Opinion Apr. 11). Although the Vienna Convention on the Law of Treaties does not technically cover agreements by international organizations, "[t]hese treaties are the subject of a draft convention which has not yet been concluded but it is not likely to be different in any major respects." L. HENKIN, *supra* note 24, at 388.

94. 42 U.N. GAOR Annex 2 (Agenda Item 136, addendum part 2), *supra* note 88, at 5.

> The legislation charges the Attorney General with the responsibility of enforcing the Act. To that end, please be advised that, should you fail to comply with the requirements of the Act, the Department of Justice will forthwith take action in United States federal court to ensure your compliance.[95]

The reference in the Meese letter to his need to "take action in United States federal court" as the method necessary to "ensure your compliance" indicated that the action by the Attorney General was not dispositive of the issue.

On March 15, the Secretary-General responded to Ambassador Okun's letter of March 11:

> As I told you at our meeting on 11 March 1988 on receiving this letter, I did so under protest because in the view of the United Nations the decision taken by the United States Government as outlined in the letter is a clear violation of the Headquarters Agreement between the United Nations and the United States. In particular, I cannot accept the statement contained in the letter that the United States may act irrespective of its obligations under the Headquarters Agreement, and I would ask you to reconsider the serious implications of this statement given the responsibilities of the United States as the host country.
>
> I must also take issue with the conclusion reached in your letter that the United States believes that submission of this matter to arbitration would not serve a useful purpose. The United Nations continues to believe that the machinery provided for in the Headquarters Agreement is the proper framework for the settlement of this dispute and I cannot agree that arbitration would serve no useful purpose. On the contrary, in the present case, it would serve the very purpose for which the provisions of section 21 were included in the Agreement, namely the settlement of a dispute arising from the interpretation or application of the Agreement.[96]

The acceptance of the Executive Branch's statements as conclusive of the ultimate position of the United States, without review by the federal courts, was an attempt to preempt the United States judicial process and to put the matter entirely under international law.[97] Meanwhile, the PLO Observer responded to the Attorney General on March 14, who, in turn, replied on March 21.[98]

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95. *Id.* at 6.

96. 42 U.N. GAOR Annex 1 (Agenda Item 136, addendum part 3) at 2, U.N. Doc. A/42/915/Add.3 (1988).

97. *See* Reisman, *supra* note 87, at 315.

98. 42 U.N. GAOR (Agenda Item 136) at 2, U.N. Doc. A/42/939 (1988).

After the Secretary-General reported to the General Assembly,[99] the Assembly reconvened from March 18 to 23. On March 23, the General Assembly adopted Resolution 42/230 reinforcing many of the statements in Resolutions 42/229A and 42/229B.[100] The stage was set for litigation both in the ICJ and in United States federal courts.

V. THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE

On March 9, the ICJ responded to the General Assembly Resolution 42/229B with an order for the UN and the United States to submit written statements on the issues to the ICJ.[101] The ICJ further decided that any other state party to the Statute of the Court could submit to the Court a written statement on the question by March 25, 1988.[102] On April 11, 1988, the ICJ would hear oral comments on written statements submitted to the Court by the United States and such other states.[103]

One paragraph of the order proved to be controversial. Noting that Resolution 42/229B (although it referred to Articles 41 and 68 of the Statute of the Court of International Justice) did not "constitute a formal request for the indication of provisional measures,"[104] the Court observed that "it is not appropriate, in the circumstances of the case, for the Court to consider whether or not provisional measures may be indicated in proceedings on a request for an advisory opinion."[105] The order continued:

> Whereas the Court takes note that the General Assembly, at the meeting at which it adopted resolution 42/229B requesting an advisory opinion of the Court also adopted resolution 42/229A, by which it '*Calls upon* the host country to abide by its treaty obligations under the Agreement and to provide assurances that no action will be taken that would infringe on the current arrangements for the official functions of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York.[106]

Judge Schwebel, voting in favor of the ICJ's order, voted against this

99. 42 U.N. GAOR (Agenda Item 136, addendum part 3), *supra* note 96, at 1.

100. Szasz, *supra* note 42, at 713.

101. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 3 (Request for Advisory Opinion Mar. 9) [hereinafter Headquarters Agreement Request for Advisory Opinion].

102. *Id.*

103. *Id.*

104. *Id.* at 4.

105. *Id.*

106. *Id.*

paragraph and stated his reasons in a separate opinion.[107] He noted that the Statute of the Court limited the jurisdiction of the ICJ to only the exact question requested.[108]

Schwebel argued that the exact question before the ICJ was "whether the United States is under an obligation to enter into arbitration in accordance with section 21 of the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations."[109] Hence, the question was confined to a preliminary question of procedure. The General Assembly had deliberately refrained from asking the ICJ any questions relating to the substantive issue of whether, under the Headquarters Agreement, the PLO Mission should be enabled "to maintain premises and adequate functional facilities" within the United States.[110] In Schwebel's view, this question was not submitted to the Court deliberately, so that it would be decided exclusively under section 21 by an arbitration tribunal with the power to render a final decision. Moreover, section 21(b) provides that either the Secretary General of the UN or the United States may ask the General Assembly to request an advisory opinion of the ICJ "on any legal question arising in the course of such [arbitral] proceedings . . . . Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court."[111] No such question had yet been put to the Court and the question before the Court concerned only the obligation to enter into arbitration pursuant to section 21 of the Headquarters Agreement. Therefore, Schwebel concluded that the ICJ had erred seriously in that offending paragraph because "that paragraph, and more explicitly the resolution which contains it, adopts a position on that question of substance."[112] "Worse still," Schwebel asserted, "in the event that arbitration were to take place between the United Nations and the United States, pursuant to section 21, . . . the Court, by quoting the paragraph in question, may have laid itself open to the charge of prejudicing that question."[113]

Judge Schwebel was correct on this question of prejudgment. Indeed, the learned judge may not have gone far enough. By joining in the order, he contributed to the possible premature consideration of the procedural issue of whether the United States was required to arbitrate

107. *Id.* at 6.

108. *Id.*; ROSENNE, 2 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 699 (1965).

109. Headquarters Agreement Request for Advisory Opinion, *supra* note 101, at 6.

110. *Id.*

111. Headquarters Agreement, *supra* note 20, § 21(b), at 100.

112. Headquarters Agreement Request for Advisory Opinion, *supra* note 101, at 7.

113. *Id.*

under section 21. As long as it was possible for a federal court in the United States to interpret the ATA in a way that allowed the PLO Mission to operate freely, an advisory opinion on the procedural question would be a prejudgment.

Both the UN and the United States submitted written statements to the Court.[114] On March 25, John Shad, the United States Ambassador to the Netherlands, wrote a two-page letter to Hon. Eduardo Valencia-Ospina, the Registrar of the Court:

> The PLO Mission did not comply with the March 11 order. On March 22, the United States Department of Justice therefore filed a lawsuit in the United States District Court for the Southern District of New York to compel compliance. That litigation will afford an opportunity for the PLO and other interested parties to raise legal challenges to enforcement of the Act against the PLO Mission. The United States will take no action to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely.
>
> The United States respectfully declines the Court's invitation to submit further views on this issue at the oral proceedings scheduled for April 11.[115]

On April 11, only the Legal Counsel of the UN appeared at the oral hearings to make a statement.[116] On April 12, the Legal Counsel responded orally to eight questions asked the previous day by four of the judges.[117] On April 26, the Court's Advisory Opinion unanimously held that the United States was under an obligation to arbitrate pursuant to section 21 of the Headquarters Agreement.[118] Judge Elias appended a declaration and Judges Oda, Schwebel, and Shahabuddeen wrote concurring opinions.[119]

The ICJ, treating the Headquarters Agreement as binding, reviewed the entire history of the exchanges between the United States government and the UN with regard to the ATA. The ICJ particularly relied on statements made by officials of the United States Justice Department. This included a press briefing held by the Assistant Attorney General in charge of the Office of Legal Counsel:

> We have determined that we would not participate in any forum,

114. Szasz, *supra* note 42, at 714.
115. Headquarters Agreement Request for Advisory Opinion, *supra* note 101, at 10.
116. Szasz, *supra* note 42, at 714.
117. *Id.*
118. Headquarters Agreement Advisory Opinion, *supra* note 87, at 35.
119. *Id.* at 35-64.

> either the arbitral tribunal that might be constituted under Article XXI, as I understand it, of the UN Headquarters Agreement, or the International Court of Justice. As I said earlier, the statute i.e., the Anti-Terrorism Act of 1987 has superseded the requirements of the UN Headquarters Agreement to the extent that those requirements are inconsistent with the statute, and therefore, participation in any of these tribunals that you cite would be to no useful end. The statute's mandate governs, and we have no choice but to enforce it.[120]

On March 14, the Permanent Observer replied to the Attorney General's letter of March 11, informing him of the United States action to close the Observer Mission and reminding the Attorney General of the United States obligations under the Headquarters Agreement and the UN Charter. The Attorney General replied on March 21:

> I am aware of your position that requiring closure of the Palestine Liberation Organization (PLO) Observer Mission violates our obligations under the United Nations (UN) Headquarters Agreement and, thus, international law. However, among a number of grounds in support of our action, the United States Supreme Court has held for more than a century that Congress has the authority to override treaties and, thus, international law for the purpose of domestic law. Here Congress has chosen, irrespective of international law, to ban the presence of all PLO offices in this country, including the presence of the PLO Observer Mission to the United Nations. In discharging my obligation to enforce the law, the only responsible course available to me is to respect and follow that decision.[121]

The ICJ, by relying on these statements to determine the intent of Congress, made an egregious error. Under Article 38(1) of the ICJ's statutes, it must decide its advisory opinions or contentious cases according to international law.[122] However, the ICJ must sometimes understand domestic law to see if there has been a breach of international law,[123] as in the Headquarter's Agreement Advisory Opinion. There was no authority for resorting to post-enactment statements of the Executive Branch of the United States government to determine the meaning of the statute and the Congressional intent, however inflammatory and obsti-

120. Headquarters Agreement Advisory Opinion, *supra* note 87, at 23.

121. *Id.* at 24.

122. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 38, para 1, 59 Stat. 1055, 1060, U.S.T.S. No. 933.

123. *See, e.g.*, Payment in Gold on Brazilian Federal Loans Issued in France (Serbian Loans Case) (Fr. v. Serbia), 1929 P.C.I.J. (ser. A) No. 20/21, at 40-47 (July 12); Payment in Gold on Brazilian Federal Loans Issued in France (Brazilian Loan Case) (Fr. v. Braz.), 1929 P.C.I.J. (ser. A) No. 20/21, at 93, 120-125 (July 12).

nate those statements might be.[124] A federal judge was in no way bound by statements made by counsel for any party, including an Assistant Attorney General, on the significance of the bill's legislative history. The ICJ attempted to pull itself up by its own bootstraps when it commented:

> The Court must further point out that the alleged dispute relates solely to what the United Nations considers to be its right under the Headquarters Agreement. The purpose of the arbitration procedure envisaged by that Agreement is precisely the settlement of such disputes as may arise between the Organization and the host country without any prior recourse to municipal courts, and it would be against both the letter and the spirit of the Agreement for the implementation of that procedure to be subjected to such prior recourse. It is evident that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation.[125]

Further, the ICJ argued that "[f]or the purposes of the present advisory opinion there is no need to seek to determine the date at which the dispute came into existence, once the Court has reached the conclusion that there is such a dispute at the date on which its opinion is given."[126] In short, the ICJ concluded that a dispute existed simply because the UN said there was one and the Attorney General insisted that the ATA applied to the PLO Mission. The intent of Congress was not considered. Therefore, section 21 applied. The ICJ cited the Secretary General in interpreting section 21: " 'In the first stage the parties attempt to settle their difference through negotiation or some other agreed mode of settlement . . . . If they are unable to reach a settlement through these means, the second stage of the process, compulsory arbitration, becomes applicable.' "[127] Emphasizing the statements by the United States Permanent Representative and the Department of Justice that the ATA must be applied notwithstanding any international obligations under the Headquarters Agreement, the ICJ concluded:

> It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since, for

124. Consequently, opinions cited by the ICJ were not authority for its position. *See* Headquarters Agreement Advisory Opinion, *supra* note 87, at 27-29.

125. Headquarters Agreement Advisory Opinion, *supra* note 87, at 29.

126. *Id.* at 30.

127. *Id.* at 32.

> example in the case concerning the *Greco-Bulgarian* "Communities" in which the Permanent Court of International Justice laid it down that "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty[.]" (P.C.I.J., Series B, No. 17, p. 32)[128]

For these reasons, the ICJ unanimously held that the United States must enter into arbitration for the settlement of the dispute between itself and the United Nations.[129]

Two judges had strong reservations about the decision. Judge Oda pointed to the Secretary of State's letter to Senator Dole of January 29, 1987, which stated that the United States was obligated to permit the PLO Mission under the Headquarters Agreement.[130] In his letter of October 27, 1987, to the Secretary-General, the Permanent Representative of the United States also expressed the view that the closing of the PLO Observer Mission would violate the Headquarters Agreement.[131] Oda reasoned that there was no dispute about the meaning of Sections 11, 12, and 13 of the Agreement since both the UN and the United States agreed that they prohibited the closing of the Observer Mission. He stated:

> [T]he difference between the United Nations and the United States was thus not the issue whether the *forced closure* of the office would or would not violate the Headquarters Agreement, but rather the issue as to what course of action within the United States domestic legal structure would be tantamount to the *forced closure* of the PLO's New York office, in which both parties would see a violation of the Agreement.[132]

Oda further stated that "[t]he discussions centered on the applicability . . . of section 21; in other words the compromissory clause itself."[133] Since the Attorney General said the ATA required the closing of the Observer Mission, the United Nations concluded that the existence of the ATA violated a treaty obligation. This troubled Oda because the real issue of the dispute was "in operative effect, precedence will be given to the uncontested interpretation or application of that Agreement or to the Anti-Terrorism Act as interpreted by the Attorney General of the United

128. *Id.* at 34.

129. *Id.* at 35.

130. *Id.* at 37.

131. Headquarters Agreement Advisory Opinion, *supra* note 87, at 37-38. The administration "vigorously opposed" the closing. *Id.* at 38.

132. *Id.* at 39.

133. *Id.* at 40.

States."[134] According to Oda, the Court should have considered the actual effect of the Attorney General's interpretation of the ATA to determine if a real dispute existed under the Headquarters Agreement because of a breach of the operative provisions by the ATA.[135] This meant that if the Attorney General's opinion was not final, there would be no disagreement about the meaning of Sections 11, 12, and 13 as opposed to the applicability of Section 21.

Likewise, Judge Schwebel, a former Assistant Legal Advisor of the State Department, was not convinced that there existed a dispute about the application of the Headquarters Agreement at this stage. He pointed to the legislative history of the ATA:

> The bill language, as I read it, does not necessarily require the closure of the PLO Observer Mission to the United Nations, since it is an established rule of statutory interpretation that US courts will construe congressional statutes as consistent with US obligations under international law, if such construction is at all plausible.
>
> The proponents of closing the PLO mission argue that the United States is under no legal obligation to host observer missions. If they are right as a matter of international law, then the language in this bill would require the closure of the PLO Observer Mission.
>
> On the other hand, if the United States is under a legal obligation as the host country of the United Nations to allow observer missions recognized by the General Assembly, then the language in this bill cannot be construed, in my opinion, as requiring the closure of the PLO Observer Mission.[136]

Schwebel concluded: "The question in the end comes to whether the United States now is bound to arbitrate the dispute, or whether it will only be so bound in the event that the District Court should order that the Act be enforced against the PLO Observer Mission."[137] This cogent reasoning appeared to be a sufficient basis for allowing the federal courts to have the final say about the United States position on the meaning and the application of the ATA, and its possible conflict with the obligations under the Headquarters Agreement. The ICJ was now faced with the problems of obedience, since an advisory opinion is, after all, only advisory.

On May 13, the General Assembly adopted Resolution 42/232, en-

134. *Id.* at 41.

135. *Id.*

136. *Id.* at 44-45 (citing 133 CONG. REC. S18,185-86 (daily ed. Dec. 16, 1987) (statement of Sen. Pell)).

137. *Id.* at 54.

dorsing the ICJ's Advisory Opinion.[138] The Resolution noted that:

> [T]he Court pointed out that "the purpose of the arbitration procedure envisaged by that Agreement is precisely the settlement of such disputes as may arise between the Organization and the host country without any prior recourse to municipal courts, and it would be against both the letter and the spirit of the Agreement for the implementation of that procedure to be subjected to such prior recourse.[139]

The General Assembly urged in its resolution that the host country "abide by its international legal obligations and to act consistently with the advisory opinion of the International Court of Justice, of 26 April 1988, and accordingly to name its arbitrator to the arbitral tribunal provided for under section 21 of the Agreement."[140]

On May 3, following the decision by the ICJ, Judge Palmieri who was hearing the actions pending in the Southern District of New York, requested the United States to indicate if it would "formally accept arbitration under the Headquarters Agreement and agree to be bound by the results."[141] Notwithstanding General Assembly Resolution 42/232, Assistant Attorney General John R. Bolton replied: "The United States has determined not to participate in any arbitration under section 21 and thus, the question of compliance with an arbitral decision cannot arise."[142]

VI. *MENDELSOHN v. MEESE*[143]

On March 23, sixty-five American citizens and organizations filed a complaint against Attorney General Meese in the Federal District Court of the Southern District of New York. The complaint sought both declaratory and injunctive relief against enforcing the ATA. The complaint contained two causes of action: the first based on the Headquarters Agreement and the second on constitutional grounds, primarily the first amendment and the Bill of Attainder clause. Three plaintiffs, Ibraham Abu-Lughod, Victor A. Ajlouny, and Nubar Hovsepian, all United States citizens, sought preliminary injunctions based on the

138. G.A. Res. 42/232, 42 U.N. GAOR (Agenda Item 136) at 1-2, U.N. Doc. A/RES/42/232 (1988). Adopted by a vote of 136 for to two against, with Israel and the U.S. opposed, and with no abstentions. Szasz, *supra* note 42, at 714.

139. G.A. Res. 42/232, *supra* note 138, at 1-2.

140. *Id.*

141. Szasz, *supra* note 42, at 714.

142. Letter of May 12, 1988, from John R. Bolton, Asst. Att'y Gen., to Judge Palmieri, *reprinted in* 27 I.L.M. 799 (1988).

143. Mendelsohn v. Meese, 686 F. Supp. 75 (S.D.N.Y. 1988).

first amendment.[144]

Both federal cases were assigned to Judge Edmund L. Palmieri, who wanted to consolidate them. He also wanted an amicus brief from the UN, which was not a party to either action, on the legal issues relating to the Headquarters Agreement.[145]

Lughod, Chair of the Political Science Department at Northwestern University, asserted that he was asked to attend a meeting in New York to explain the PLO's position on the current situation in the Middle East, but was unable to do so unless his travel expenses were reimbursed by the PLO.[146]

Aljouny stated that he was requested by the Palestine Red Crescent Society, a constituent group of the PLO, "to undertake a series of speaking engagements in the United States with funds provided by the Palestine Red Crescent Society."[147] Aljouny insisted that he was unable to do so unless his travel expenses were paid in advance.[148]

Hovsepian maintained that the PLO requested that he establish and maintain an office in the United States to gather, write, and disseminate information on the Palestinian people. He also claimed that the PLO asked him to arrange for speakers and forums to discuss the Palestinian people. He swore that he was prepared to open the office immediately, had laid out his initial plans for the office, and had received commitments from individuals for the necessary funding. These plans were "contingent only on a determination that it would be lawful under the Act to open the office."[149]

Following oral arguments on March 29, the District Court denied the motions for preliminary injunctive relief on the cause of action based on constitutional grounds. The motion was denied because the parties failed to "show (1) irreparable harm and (2) either (a) a likelihood of success on the merits or (b) both (i) that it has raised sufficiently serious questions going to the merits to make them a fair ground for litigation and (ii) that the balance of hardships tips decidedly in its favor."[150] The District Court found that postponing payment until the suit was resolved, even if the citizens had a protected first amendment right to have their speaking activities subsidized by the PLO, would not irreparably

144. *Id.* at 77-78.
145. Szasz, *supra* note 42, at 714.
146. *Mendelsohn*, 686 F. Supp. at 78.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*.

harm those citizens challenging the constitutionality of a statute prohibiting expenditure of PLO funds in the United States.[151] Likewise, an American citizen contesting the constitutionality of a statute that prohibited the expenditure of PLO funds in the United States was not entitled to a preliminary injunction absent his desire to open a PLO information office.[152] Therefore, neither the delay in the citizen's receipt of possible funding, nor the possibility that the office would be closed at the conclusion of the litigation constituted irreparable harm.[153]

The District Court noted, however, that Hovsepian did present a "slightly different problem" because he was "prepared to go forward immediately with the establishment of an office *at the behest* of the PLO, but *with no funds from* the PLO."[154] Hovsepian argued that his funders would "not provide funds in the absence of an injunction staying the enforcement of the statute against the office."[155] Because the ATA provided for no penalty and Hovsepian only risked the shutdown of the information office and the forced restitution of any PLO funds he received, there was no basis for a preliminary injunction.[156]

The District Court stated that there was little likelihood that the plaintiffs would succeed on their claim based on a First Amendment right to be subsidized to speak on issues of public importance. Therefore, no preliminary relief would lie on these grounds either:

> It is beyond argument that the interest of the United States in opposing terrorism is a compelling one. This interest is unrelated to the prevention of free expression. The Act is very specific that it is not based upon a disagreement with the content of the message advocated by the PLO, but is designed instead to implement Congress' determination that the PLO is a terrorist organization and a threat to the interest of the United States and should not benefit from operating in the United States. [157]

Finally, the District Court refused to find that the balance of hardships tipped in favor of the plaintiffs.[158] Precluding the plaintiffs from engaging in public interests specified by Congress, weighed heavily against the District Court's discretion to grant a preliminary injunction. The District Court stated, " '[t]he general rule is that equity will not in-

151. *Id.* at 79.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 81 (citing 22 U.S.C.A. § 5201(b) (West Supp. 1988)).
158. *Id.*

terfere to prevent the enforcement of a criminal statute even though unconstitutional.' "[159] " 'To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights.' "[160] The District Court found none of the recognized exceptions to this rule in this case. Following the denials of these motions by the District Court on April 12,[161] the plaintiffs withdrew their motion for preliminary relief under the Headquarters Agreement.[162]

On June 29, 1988, Judge Palmieri decided the PLO Mission case and the companion case of *Mendelsohn v. Meese*.[163] Having been denied preliminary injunctive relief in *Mendelsohn*, [164] the three plaintiffs were joined in this action for a declaratory judgment in *Mendelsohn v. Meese* by Riyad H. Monsour, a United States citizen employed as Deputy Permanent Observer at the PLO Observer Mission. Monsour was also a party to *United States v. PLO* because he was a member of the Mission. In *Mendelsohn*, the plaintiffs challenged the ATA on various constitutional grounds. Monsour charged that if applicable to the Observer Mission, the ATA would be unconstitutional.[165] The plaintiffs' second claim sought a declaratory judgment that the ATA violated their right of free speech and association guaranteed by the First Amendment to the Constitution, as well as the U.S. Constitution's prohibition of Bills of Attain-

159. *Id.*

160. *Id.* (citing Spielman Motor Sales Corp. v. Dodge, 295 U.S. 89, 95 (1935); *accord* Downstate Stone Co. v. United States, 651 F.2d 1234, 1238 (7th Cir. 1981); *cf.* Socialist Workers Party v. Attorney General of the United States, 642 F. Supp. 1357, 1430 (S.D.N.Y. 1986) (federal criminal statutes)).

161. *Id.* at 75 (issuing date).

162. Szasz, *supra* note 42, at 714. A completely separate litigation took place with regard to the closing of the Palestine Information Office in Washington as the result of a State Department order brought pursuant to the Foreign Missions Act, 22 U.S.C. § 4301 (1982), made several months before the adoption of the ATA.

> This action is being taken to demonstrate U.S. concerns over terrorism committed and supported by organizations affiliated with the PLO. Among our particular concerns are the continued membership of the PLO executive committee of Abu al Abbas, who has been linked directly with the murder of an American citizen; the participation in the Palestine National Congress of groups having a history of involvement with terrorism — for example, the Popular Front for the Liberation of Palestine and the Democratic Front for the Liberation of Palestine, both of which rejoined the PLO at the April PNC. . . . [W]e believe [that the order] is a strong signal of how we feel about the question of international terrorism and groups that associate with it.

Palestine Information Office v. Shultz, 853 F.2d 932, 942 (D.C. Cir. 1988).

163. Mendelsohn v. Meese, 695 F. Supp. 1474 (S.D.N.Y. 1988).

164. Mendelsohn v. Meese, 686 F. Supp. 75 (S.D.N.Y. 1988).

165. *Mendelsohn*, 695 F. Supp. at 1476.

der.[166] Other plaintiffs claimed that the ATA violated their rights to receive information and to engage in face-to-face dialogue with Lughod and Ajlouny.[167] Judge Palmieri found that these plaintiffs lacked standing.[168]

With regard to the other plaintiffs (Lughod, Ajlouny, Hovsepian, and Monsour), the District Court first discounted any first amendment rights on the part of Monsour.[169] Although he was asserting his First Amendment rights as a United States citizen, Monsour was found to be acting in his capacity as an official representative of the PLO.[170] The PLO is "an organization whose status, while uncertain, lies outside the constitutional system."[171] The District Court reasoned:

> It would make no sense to allow American citizens to invoke their constitutional rights in an effort to act as official representatives of foreign powers upon which the political branches have placed limits. Doing so would severely hamper the ability of the political branches to conduct foreign affairs. Any action harming the interests of a foreign power could otherwise be challenged in court as a violation of Americans' due process or First Amendment rights. Diplomatic relations could not be severed, for the foreign government could enlist American citizens to act as its representatives.[172]

The District Court invoked the foreign affairs power as a basis for this conclusion.[173] It is questionable whether this was an appropriate area for Congress if it is the exclusive domain of the President.

Finding that the ATA was not aimed at limiting speech, the District Court concluded that the ATA was not a content-based restriction on speech, and consequently, need not be subject to the "most exacting scrutiny."[174] Relying on *United States v. O'Brien*,[175] the District Court stated that the First Amendment "defines parameters upon the permissible construction of the ATA."[176] The District Court refused to accept the Government's argument that the mere acceptance of funds from the PLO or by association with the PLO placed Lughod, Ajlouny, and Hov-

166. "No Bill of Attainder or ex post facto law shall be passed." U.S. CONST. art. I, § 9, cl. 3.
167. *Mendelsohn*, 695 F. Supp. at 1477.
168. *Id.* at 1478.
169. *Id.* at 1481.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1483 (quoting Boos v. Barry, 485 U.S. 312 (1988)).
175. 391 U.S. 367 (1968).
176. Mendelsohn v. Meese, 695 F. Supp. 1474, 1483 (S.D.N.Y. 1988).

sepian in the same situation as Monsour because "the line between an official representative of a foreign entity and an agent, 'dominated' and 'controlled' by a foreign power is one we cannot cross . . . ."[177] Therefore, the District Court held that these plaintiffs could assert First Amendment rights.[178] In determining what was constitutionally permissible for the Congress to do in the ATA, the Court construed it to validly restrict the transfer of funds to Lughod and Ajlouny. The statute could not, however, be construed to prohibit Hovsepian's proposed office.[179] The Court pointed out the meaning of the words "at the behest or direction of" in section 5202(3) of the ATA was determinative:

> Hovsepian presents a different situation. The ATA, read in the broadest possible way, prohibits Hovsepian from establishing or maintaining his proposed informational office at the behest of the PLO. Hovsepian has specifically averred that he will in no way be acting as an official of the PLO. But he does wish to further the PLO's interests; and the PLO has requested him to open his office. Were the ATA to be read to prohibit that course of action, it would violate the requirement that the restriction be no greater than essential. It would be prohibiting Hovsepian from operating in the United States, not the PLO. The words 'behest' and 'direction' need not be given the broadest reading possible. Indeed, a more limited approach appears consistent with congressional intent.[180]

The District Court avoided declaring any foreign affairs statute unconstitutional because it would lead to a review of the entire national security apparatus, in particular, the National Security Act of 1947.[181] The District Court found that the ATA, while a Bill of Attainder in form, was permissible by virtue of Congressional power in the field of foreign affairs. The District Court noted:

> The ATA reflects a sense of outrage entertained by a wide segment of the American people and their elected officials concerning the crimes of foreign terrorists. On its face, it is an accusatory document penalizing PLO employees by closing their offices and effectively terminating their activities in the United States. Having been effectively singled out by Congress, they are left without any right of reply or appeal, without right to confront their accusers or submit evidence in an adversarial

177. *Id.* at 1481.

178. *Id.*

179. *Id.*

180. *Id.* at 1486.

181. 50 U.S.C. §§ 401-432 (1982). This Act established a comprehensive national security system, including the Department of Defense, Central Intelligence Agency, and National Security Council, and provided for Congressional oversight of these agencies. *Id.*

> proceeding. They are terrorists by statutory implication but without the slightest proof of their involvement in terrorism. In short, they are subjected to penalties without the panoply of protective shields vouchsafed even to criminal aliens by the federal courts in criminal trials.[182]

However, this was not enough to defeat the legislation. The District Court concluded: "We believe the ATA would present a classic Bill of Attainder were it not for the fact that, as we construe it, it is an exercise of Congress' foreign affairs powers."[183] Since it does involve Congress' foreign affairs powers, the basic reason behind the prohibition of Bills of Attainder, the separation of powers, is not operative, because Congress did not intend to usurp the judicial function.[184] Finding that the ATA did not violate the Bill of Attainder clause,[185] the District Court asserted:

> It can be construed as an appropriate exercise of Congress' power, operating, as we have explained above in the related opinion, *United States v. PLO, ante*, to curb the PLO itself in the United States and not its Mission and its personnel at the United Nations. In this sense, it withstands First Amendment scrutiny and does not violate the Bill of Attainder clause.
>
> The PLO is the subject of this legislation. It effectively penalizes individuals only in prohibiting them from acting in an official capacity as representatives of the PLO. Congress must have the power to do that, since the PLO, as a foreign political entity, stands outside our constitutional structure.[186]

The District Court did not define the contours of this approach to the ban on the bills of attainder, leaving it unclear how far Congress can go under the foreign affairs power in punishing certain individuals without a trial. Moreover, the ATA let the President terminate its provisions by "certif[ying] in writing to the President *pro tempore* of the Senate and the Speaker of the House that the Palestine Liberation Organization, its agents, or constituent groups thereof no longer practice or support ter-

182. Mendelsohn v. Meese, 695 F. Supp. 1474, 1487-88 (S.D.N.Y. 1988) (footnotes omitted). The Court also relies on the fact that the PLO is a "foreign entity," standing outside our constitutional structure, as a basis for finding that the ATA, which is directed at the PLO, does not violate the prohibition against Bills of Attainder. *Id.* at 1488-89.

183. *Id.* at 1488.

184. *See* United States v. Brown, 381 U.S. 437, 442 (1965) (The ban on bills of attainder is not to be construed as "a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature."); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-6, at 657 (2d ed. 1988).

185. *Mendelsohn*, 695 F. Supp. at 1489.

186. *Id.* at 1490.

rorist actions anywhere in the world."[187] This could be interpreted as a violation of the separation of powers, or simply as a joint exercise of the foreign affairs powers by the legislative and executive branches. If it was the latter, this would place the power of the national government at its highest level.[188] The proper role for the Court thus depended on a characterization of the legislation. This was the challenge faced by Judge Palmieri in the PLO Mission case.

VII. *UNITED STATES v. PALESTINE LIBERATION ORGANIZATION*

A characterization of the ATA as an exercise of the foreign affairs power still required the District Court to decide if there was an intention to violate U.S. obligations under the international law created by a treaty.

The Bar Association of the City of New York, along with the UN, had been granted leave to appear as amici curiae.[189] The Association argued that the case was not yet ripe for final disposition by the District Court, because the final resolution depended on the interpretation of the Headquarters Agreement by arbitration. "After the arbitrators have determined the scope of the Access Clause of the Headquarters Agreement, this Court should proceed to construe the Anti-Terrorism Act to determine whether it can be reconciled with the international obligation as thus construed."[190] The Association argued that the Court should stay

187. 22 U.S.C. § 5201(b) effective date of termination (Supp. 1987).

188. *See* Goldwater v. Carter, 444 U.S. 697, 734-36 (1979); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952); United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936).

189. "The court [found] that both amici ha[d] an adequate interest in the litigation, even at the district level, and that their participation was desirable." United States v. PLO, 695 F. Supp. 1456, 1458 n.** (S.D.N.Y. 1988).

Keith Highet and Joseph D. Pizzaro were for the United Nations, amicus curiae, while Sheldon Oliensis, President, Saul L. Sherman, and Stephen L. Kass were for The Association of the Bar of the City of New York, amicus curiae. For the Attorney General were Rudolph W. Guiliani, U.S. Att'y, Richard W. Mark, Asst. U.S. Att'y, John R. Bolton, Asst. Att'y Gen. Mona Butler, David J. Anderson, and Vincent M. Carvey. For the defendant Riyad H. Monsour were Leonard B. Boudin, Michael Krinsky, David Golove, Nicholas E. Poser, and David B. Goldstein, all of Rabinowitz, Boudin, Standard, Krinsky & Lieberman. For defendants PLO, PLO Mission, Zuhdi Labib Terzi, Riyad H. Mansour, Nasser Al-Kidwa, and Veronica Kanaan Pugh, were Ramsey Clark, and Lawrence W. Schilling. *Id.* at 1457-58. Carl-August Fleischauer, Under-Secretary-General and Legal Counsel for the United Nations was permitted to address the court at the outset of the arguments of counsel that took place on June 8, 1988. *Id.* at 1458 n.**.

190. Amicus Curiae Brief, Ass'n of the Bar of the City of New York at 9, United States v. PLO, 695 F. Supp 1456 (S.D.N.Y. 1988).

the action. Counsel for the PLO and for the UN supported this argument.[191] The PLO stated that this duty to arbitrate deprived the Court of subject matter jurisdiction.[192]

Judge Palmieri rejected this argument for several significant reasons. The decision not to arbitrate was made by the Executive Branch in an area of international policy.[193] "The restrictions imposed upon the courts forbidding them to resolve such questions (often termed 'political questions') derive not only from the limitations which inhere in the judicial process but also from those imposed by Article III of the Constitution."[194]

The district court stressed that it lacked the power to examine the reasons for the decision not to arbitrate. To do so would involve the district court in making foreign policy, to the embarrassment of the Executive. Reasoning from the standards of political questions set forth in *Baker v. Carr*,[195] the district court concluded that "the ultimate decision as to how the United States should honor its treaty obligations with the international community is one which has, for at least one hundred years, been left to the executive to decide."[196] Yet the district court noted that the political question doctrine was inapplicable to its duty to interpret the Headquarters Agreement and the ATA.[197] "We are interpreting the Agreement, but are unwilling to expand the reach of its arbi-

191. *Id.* at 12.

192. *PLO*, 695 F. Supp. at 1461.

193. The Court also found the Federal Arbitration Act (9 U.S.C. § 2 (1982)) to be applicable only to "a written agreement evidencing a transaction involving commerce." *Id.* at 1462 n.19 (citing Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 200-01 (1956)).

194. *PLO*, 695 F. Supp. at 1462 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this Court.")). "The decision in *Marbury* has never been disturbed." *Id.*

195. 369 U.S. 186, 217 (1962). The District Court stated: "Resolution of the question . . . requires 'an initial policy determination of a kind clearly for nonjudicial discretion,' would be impossible without the Court 'expressing lack of the respect due coordinate branches of government;' and such a decision would raise not only the 'potentiality' but the reality of 'embarrassment from multifarious pronouncements by various departments on one question.'" United States v. PLO, 695 F. Supp. 1456, 1463 (S.D.N.Y. 1988) (citing *Baker*, 369 U.S. at 217).

196. *PLO*, 695 F. Supp. at 1463 (citing Goldwater v. Carter, 444 U.S. 996, 996-97 (1979); Clark v. Allen, 331 U.S. 503, 509 (1947); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 602 (1889); *accord* Whitney v. Robertson, 124 U.S. 190, 194-95 (1888)).

197. *Id.* at 1463 n.22 (citing Japan Whaling Assoc. v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986)).

tration clause to a point which would be inconsistent with the limitations placed upon us by the Constitution."[198]

The district court refused to accept the argument of the Bar Association of the City of New York for another reason. "Section 21 of the Headquarters Agreement cannot provide a rule of decision regarding the interpretation of that agreement . . . treating it as doing so would require the courts to refrain from undertaking their constitutionally mandated function."[199] This function was set forth, according to the district court, in *Marbury v. Madison* in which Chief Justice Marshall said, "It is emphatically the province and duty of the judicial department to say what the law is."[200]

The district court stated that "[a]s a matter of domestic law, the interpretation of these international obligations and their reconciliation, if possible, with the ATA is for the courts."[201] The effect of the United States international obligations, particularly the UN Charter and the Headquarters Agreement, had to be considered in interpreting the ATA. "That duty will not be resolved without independent adjudication of the effect of the ATA on the Headquarters Agreement. Awaiting the decision of an arbitral tribunal would be a repudiation of that duty."[202] The district court found that it should not "await the interpretation of the Headquarters Agreement by an arbitral tribunal, not yet constituted, before undertaking the limited task of interpreting the ATA with a view to resolving the actual dispute before it."[203] As a result, the district court found that it was "not deprived of subject matter jurisdiction by section 21 of the Headquarters Agreement."[204]

The district court pointed out that the UN had explicitly refrained from becoming a party to the litigation. Since the arbitration provisions of section 21 governed disputes only between the UN and the United States, the district court found it inapplicable on its face. Had the UN been a party, the result might have been different. If international law is part of United States law,[205] the district court may have been obliged to apply the norm of *pacta sunt servanda* ("agreements are to be kept");[206]

198. *Id.*
199. *Id.* at 1463.
200. *Id.* at 1464 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *See* The Paquette Habana, 175 U.S. 677 (1900).
206. *See* UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES *supra* note 91, art. 26, at 292. "Every treaty in force is binding upon the parties to it and must be performed by

however, this is speculation. The district court had to reconcile the ATA and the Headquarters Agreement, primarily as a matter of domestic law under the Supremacy Clause and statutory interpretation. Treaties, in this context, are not simply international obligations governed by international law, but are part of the "supreme law of the land."[207] What this means in practice was ultimately the basis of the Court's decision.

The court accepted, in principal, the last in time doctrine, which "is based on a reading of the supremacy clause which puts treaty law on the same, but not a higher, footing as federal statutory law. Thus either may repeal the other."[208] The district court stated: "Under our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them."[209] In the "Head Money" cases, *Edye v. Robertson*,[210] the Supreme Court stated that even self-executing clauses of a treaty are placed in the same category as other laws of Congress.[211] The Chinese Exclusion Case, *Chae Chan Ping v. United States*,[212] held that the violation by the Chinese Exclusion Act of 1888 of treaties with China was not a basis for objecting to the statute's validity. The Supreme Court asserted:

> A treaty . . . is in its nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.[213]

In *Whitney v. Robertson*,[214] the Supreme Court added:

> When the two [treaty and statute] relate to the same subject, the courts

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them in good faith." *Id.* It would be difficult for the PLO to argue in this case that it was a third party beneficiary of the Headquarters Agreement in light of Articles 34, 35, and 36 of the Vienna Convention. *See id.* arts. 34-36, at 294.

207. U.S. CONST. art. VI, cl. 2.

208. T. FRANCK & M. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 294 (1987). An early case establishing the "last in time" doctrine is The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.").

209. United States v. PLO, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988).

210. 112 U.S. 580 (1884).

211. *Id.* at 597-99.

212. 130 U.S. 581 (1889).

213. *Id.* at 600.

214. 124 U.S. 190 (1888).

> will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.[215]

"Wherever possible, both are to be given effect," the district court stated.[216] Acknowledging that "Congress has the power to enact statutes abrogating prior treaties or international obligations" of the United States, the district court stressed that the Court had a duty to interpret statutes consistent with treaty obligations.[217] Thus, "[o]nly where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence."[218] The origins of this rule of construction lie in Chief Justice Marshall's decision in *The Charming Betsy*:[219]

> It has also been observed that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . . These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.[220]

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215. *Id.* at 194.

216. United States v. PLO, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) (citing Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690, *modified*, 444 U.S. 816 (1979); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963); Clark v. Allen, 331 U.S. 503, 510-11 (1947); Chew Heong v. United States, 112 U.S. 536, 550 (1884)).

217. *Id.* at 1465.

218. *Id.* at 1464-65 (citing Chae Chan Ping v. U.S. (Chinese Exclusion Case), 130 U.S. 581, 599-602 (1889) (finding clear intent to supersede); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 597-99 (1884) (same, decided on the same day as Chew Heong, 112 U.S. 536, 550 (1884), which found no such intent); South African Airways v. Dole, 817 F.2d 119, 121, 125-126 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 896 (1987) (Anti-Apartheid Act of 1986, directing the Secretary of State to "terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa" irreconcilable with that treaty); Diggs v. Schultz, 470 F.2d. 461, 466 (D.C. Cir 1972), *cert. denied*, 411 U.S. 931 (1973); *cf.* Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (finding no clear intent to abrogate treaty); McCulloch v. Sociedad de Marineros, 372 U.S. 10, 21-22 (1963) (same); Cook v. United States, 288 U.S. 102, 119-120 (1933)).

219. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 137, (1804). For a survey of other countries following this approach, see Morgenstern, *Judicial Practice and the Supremacy of International Law*, 27 BRIT. Y.B. INT'L L. 42, 83-84 (1950).

220. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) at 143; *see also* Weinberger V. Rossi, 456 U.S. at 32 (1982). The PLO court cites a number of other cases in accord: Trans World Airlines, 466 U.S. at 252; Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. at 690, Menominee Tribe of Indians, 391 U.S. at 412-13; McCulloch v. Sociedad de Marineros, 372 U.S. at 21-22; Lauritzen v. Larsen, 345 U.S. 571, 578 (1953);

In addition, the district court cited revised *Restatement (Third) Foreign Relations Law of the United States* with approval:

> § 115. Inconsistency Between International Law or Agreement and Domestic Law: Law of the United States
> (1)(a) An Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States *if the purpose of the act to supersede the earlier rule or provision is clear* or if the act and the earlier rule or provision cannot be fairly reconciled.[221]

In applying this principle, the district court found no clear legislative intent that Congress was directing the Executive or Judicial branches to act in contravention of the Headquarters Agreement. "We believe the ATA and the Headquarters Agreement cannot be reconciled except by finding the ATA inapplicable to the PLO Observer Mission."[222]

An examination of the district court's decision leads to an inquiry as to whether the district court's need to find the ATA inapplicable to the PLO Mission dictated its conclusions about Congressional intent. In other words, was there any real basis for going beyond the plain meaning of the ATA in determining if it necessitated the closing of the PLO Mission?[223] Some scholars claim that "any conflict between the legislative will and the judicial will must be resolved in favor of the former."[224] It would appear that Judge Palmieri found a sufficiently tiny hole through which to escape from the trap of forcing the closing of the PLO Mission, allowing him to stand on existing law in reaching his conclusion. This made it unnecessary to go beyond the traditional contours of the last in time doctrine.

Congress can be crafty. Frequently, it enacts statutes that appear to be straightforward, but which upon a closer examination are subject to any number of interpretations. This is not due solely to the difficulties of draftsmanship; it is a way of appearing to satisfy constituents without actually doing what it appears to accomplish. This gives the courts the opportunity to get Congress off the hook, and take the blame for suppos-

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Clark v. Allen, 341 U.S. at 510; Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934); Cunard S.S. Co. v. Mellon, 262 U.S. 100, 132 (1923) (Sutherland, J., dissenting).

221. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 115(1)(a) (1988) (court's emphasis).

222. United States v. PLO, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988).

223. *Compare* Church of Holy Trinity v. United States, 143 U.S. 457 (1989) (showing flexible reading of statute) *with* Griffin v. Oceanic Contractors, 458 U.S. 564 (1982) (showing strict adherence to statutory language).

224. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 8 (1975).

edly thwarting Congress' will.[225] Legislative history is becoming less reliable because the key players in Congress know how to make statements at key points in the bill's passage (or even after) to give their interpretation. Committee reports and Presidential statements can likewise reflect attempts to twist legislative intent. With this continuous game, a court can either retreat to the plain meaning rule or it can play a constructive role in statutory interpretation by accepting the lack of clarity in both the language and history of statutes that exists for a variety of reasons. Courts are an inherent part of the legislative process that does not end with the passage of a bill. An appreciation of Judge Palmieri's decision is possible in light of the realities which he faced. His was not a radical decision; it was traditional, even if the results are startling to some.

In determining the obligations of the United States under the Headquarters Agreement, particularly Sections 11 (the access clause) 12, and 13, the district court observed that "[t]he United States has, for fourteen years, acted in a manner consistent with a recognition of the PLO's rights in the Headquarters Agreement. This course of conduct under the Headquarters Agreement is important evidence of its meaning."[226] Statements by the Executive Branch and the UN supported this position. The United States Representative to the UN during consideration of a report of the Committee on Relations with the Host Country by the General Assembly, declared that "the United States Secretary of State had stated that the closing of the mission would constitute a violation of United States obligations under the Headquarters Agreement."[227] The district court concluded: "It seemed clear to those in the executive branch that closing the PLO mission would be a departure from the United States practice in regard to observer missions, and they made their views known to members of Congress who were instrumental in the passage of the ATA."[228] The district court also noted that both the Department of Justice and the Department of State appeared to support current efforts to repeal the ATA.[229] The court also referred to UN opinions that the Headquarters Agreement applied to the PLO Mission

225. *See* H. JONES, K. KERNOCHAN, & A. MURPHY, LEGAL METHOD 348 (1980) ("It sometimes becomes necessary as a matter of political compromise to eliminate some precise key-word in the bill and substitute for it some less exact term, chosen deliberately to leave a controversial issue to the courts for decision.")

226. *PLO*, 695 F. Supp. at 1466, (citing O'Connor v. United States, 479 U.S. 27, 33 (1986)).

227. 42 U.N. GAOR C.6 (58th mtg.) para. 3, at 2, U.N. Doc. A/C.6/42/SR.58 (1987).

228. United States v. PLO, 695 F. Supp. 1456, 1467 (S.D.N.Y. 1988).

229. *Id.* at 1467 n.25.

and to General Assembly Resolutions 42/20, 42/229A, and 42/232.[230]

The government urged a literal application of the maxim *leges posteriores priores contrarias abrogant*; in the event of conflict between two laws, the one of later date will prevail. In reconciling the ATA and the Headquarters Agreement, Judge Palmieri specifically rejected this approach.[231] Citing a long line of cases, he concluded that "Congress' failure to speak with one clear voice on this subject requires us to interpret the ATA as inapplicable to the Headquarters Agreement."[232] Palmieri justified his conclusion with three arguments:

> First, Congress did not mention either the PLO Mission or the Headquarters Agreement in the ATA. The court found the absence of specific references to the Mission and Headquarters Agreement in the ATA particularly significant because, prior to passage of the statute, the State Department had informed Congress of its view that closure of the PLO Mission would be inconsistent with the obligations of the United States under the Headquarters Agreement. Second, the ATA's provisions prohibiting maintenance of PLO office applied "notwithstanding any provision of *law* to the contrary," but did not purport to apply notwithstanding any *treaty*. Third, a review of the legislative history of the ATA indicated that no member of Congress had expressed a clear and unequivocal intent to supersede the Headquarters Agreement. The only debate on the issue focused on whether the United States had an obligation to provide access to the PLO, and every proponent of the ATA argued, under a misapprehension, that no such obligation existed under the Headquarters Agreement.[233]

The first point is obvious. There is no mention of the PLO Mission or the Headquarters Agreement in the legislation. Therefore, the Executive Branch's argument that closing the PLO Mission would violate United States obligations under the Headquarters Agreement could be perceived to have taken effect in Congress, but for the sweeping language of the ATA. Although the word "treaty" is not mentioned, Section 5202(3) does state that it shall be unlawful "notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments."[234] The district court found the absence of any interpretive instruction significant because elsewhere in the same legislation Congress expressly referred to "United

230. 1979 U.N. JURID. Y.B. 169-70, U.N. Doc. ST/LEG/SER.C/17; *see* 1980 U.N. JURID. Y.B. 188, U.N. Doc. ST/LEG/SER.C/18.

231. *PLO*, 695 F. Supp. at 1469.

232. *Id.* at 1468.

233. Koenig, *supra* note 37, at 835-36 (1988).

234. 22 U.S.C. § 5202(3) (Supp. 1987).

States law (including any treaty)".[235]

If, as Palmieri suggested, the last in time doctrine is still good law, laws and treaties are equal based on domestic law. If this is so, it is likely that Congress intended the term "law" to cover both Congressional legislation and treaties.

Whether this is a real or constructive ambiguity revolves around the third argument, that "no member of Congress expressed a clear and unequivocal intent to supersede the Headquarters Agreement by the passage of the ATA."[236] This presents an apparent contradiction in the decision. Palmieri argued that most people who "addressed the subject of conflict denied that there would be a conflict: in their view, the Headquarters Agreement did not provide the PLO with any right to maintain an office."[237] Palmieri had already explained how the Executive Branch had informed Congress that there was an obligation under the Headquarters Agreement to keep the PLO Mission open and that the ATA would, as drafted, violate that obligation. Therefore this position by most who addressed the subject of conflict is not a misapprehension, but a rejection of the position of the Executive Branch. Palmieri concluded that, "Congress provided no guidance for the interpretation of the ATA in the event of a conflict which was clearly forseeable."[238]

The district court found its interpretation consistent with its view of the nature of the legislative history. Senator Claiborne Pell, Chair of the Senate Foreign Relations Committee, who voted for the bill, had raised the possibility that the Headquarters Agreement would take precedence over the ATA if there was a conflict.[239] The Senate did not even debate Pell's suggestion, even though it came in the final minutes before passage of the ATA.[240]

Judge Palmieri does not deny the awareness in Congress of a potential conflict between the ATA and the Headquarters Agreement. However, in his opinion, most members of Congress believed the closing of the PLO Mission would not violate the Agreement. This was probably sufficient to assure that his decision would not be overturned on appeal. To do so, the Court of Appeals would have to find that his "careful and convincing review of the legislative history was erroneous. . . ."[241] Con-

235. Foreign Relations Authorization Act, Pub. L. No. 100-204, § 128, 101 Stat. 1343 (1987).

236. United States v. PLO, 695 F. Supp. 1456, 1468-69 (S.D.N.Y. 1988).

237. *Id.* at 1469.

238. *Id.*

239. 133 CONG. REC., *supra* note 11, at S18,185-86.

240. *PLO*, 695 F. Supp. at 1469.

241. Koenig, *supra* note 37, at 836.

gress could always amend or "reenact the ATA with a clear statement of intent"[242] to shut the PLO Mission. This gave the Second Circuit less motivation to hear the district court's decision on appeal.

The district court refused to strike the ATA down entirely, finding it remained "a valid enactment of general application"[243] that restricted "PLO activity in the United States,"[244] apart from its inapplicability to the PLO Mission.

The United States decided not to appeal the district court's decision. On August 29, 1988, the United States announced that this was being done "in light of foreign policy considerations, including the U.S. role as host to the United Nations Organization."[245] According to a *New York Times* article, the President personally resolved the appeal issue, overriding the Justice Department.[246]

VIII. CONCLUSION

The ICJ was premature. Advisory opinions can be given at the request of the General Assembly even though a real controversy underlies them. However, advisory opinions should not be given until the local court has spoken on the meaning and applicability of the offending legislation. The Executive Branch in the United States could have withheld action. It should have relied on the canon of construction in *The Charming Betsy* for a means to avoid violating United States treaty obligations. Some sympathy still remains for the Attorney General since he clearly wished to let the federal courts have the final say without provoking Congress to even greater specificity. This closed the door to any interpretation pursuant to *The Charming Betsy* canon. Judge Palmieri correctly relied on this canon. This must be a strong presumption rebutted only by

242. *Id.*

243. United States v. PLO, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988).

244. *Id.*

245. N.Y. Times, Aug. 30, 1988, at A1, col. 8 (Justice Department statement).

246. *Id.* The New York Times reported:

> State Department officials said their desire to avoid closing the PLO mission was based on their reading of American obligations to the United Nations, and was not significantly affected by recent statements from various P.L.O. figures saying that their organization was considering formation of a provisional government or a government in exile in the territories occupied by Israel. Such a provisional P.L.O. regime might recognize Israel's existence as a state.
>
> But department officials said they tended to agree with Arab diplomats, who warned that the United States would set back Middle East peace efforts if it persisted in trying to close the P.L.O. mission.

Id.

the clearest language conveying Congressional intent to override the treaty with subsequent legislation.

Finally, the last in time doctrine might be obsolete, a remnant of an outdated notion of sovereignty that views international relations as a jungle rather than as a law-governed system in which all branches of government of a nation-state are bound by its valid international agreements. The only way such agreements lose their force is by a valid termination pursuant to international law.[247] While Palmieri's decision does not go this far, it challenges Congress to decide if it wishes to break international law.[248] To those who read his decision to be a usurpation of the legislative function, his understanding of *The Charming Betsy* canon of construction makes it a rule that virtually under no circumstances can Congress have such intent unless it surprisingly expresses its will with total clarity. Such an approach is palatable and a reenforcement of the global norm of *pacta sunt servanda*, without which treaties are meaningless.

247. *See* UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, *supra* note 91, art. 42-72, at 295-99; Goldwater v. Carter, 617 F.2d 697, 706 (D.C. Cir.) (en banc) *vacated on other grounds*, 444 U.S. 996 (1979). While the President could veto legislation that specifically overturns a treaty, that veto could be overridden by Congress, giving the legislative branch the power, in effect, to terminate a treaty alone, raising serious questions about the foreign relations powers of the president. *See id.* at 996; United States v. Curtis-Wright Export Corp., 299 U.S. 304, 319-20 (1936); Dole v. Carter, 569 F.2d. 1109, 1110 (10th Cir. 1977); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952).

Moreover, Congress has no need for such a power to overturn a treaty it believes violates the constitutional rights of U.S. citizens, as this is the proper province of the courts. *See* Reid v. Covert, 354 U.S. 1, 5-9 (1957) (supremacy clause and executive agreements); *cf.* Missouri v. Holland, 252 U.S. 416, 432 (1920).

248. Van der Weyde v. Ocean Transport Co., 297 U.S. 114 (1936).